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# North Dakota: Flipping the Bird at the Migratory Bird Treaty Act Since 2012

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# NORTH DAKOTA: FLIPPING THE BIRD AT THE MIGRATORY BIRD TREATY ACT SINCE 2012

KRISZTINA NADASDY\*

**Abstract:** Under the Migratory Bird Treaty Act (MBTA) it is a federal misdemeanor to kill a migratory bird “by any means, or in any manner.” In 2012, three oil and gas companies operating in the Bakken region of North Dakota were charged with violations of the MBTA after dead and oiled birds were found in and around their oil reserve pits. In *United States v. Brigham Oil & Gas, L.P.*, the companies challenged the violations by claiming that the MBTA applied only to conduct directed at birds, and not to lawful commercial activities that might result in the incidental death of birds. The District Court for the District of North Dakota agreed and dismissed the charges. This Comment argues that the motion to dismiss should not have been granted because the court’s interpretation of the MBTA’s scope is too narrow and runs counter to binding and persuasive precedent acknowledging that incidental killing is within the scope of the MBTA.

## INTRODUCTION

Western North Dakota is traditionally thought of as a quiet and remote place, or a “desolate, grim beauty” as Theodore Roosevelt once described it.<sup>1</sup> Recently, however, Roosevelt’s words have taken on a different meaning, as this once quiet and remote area has suddenly become the nation’s playground for oil and gas exploration in a way never experienced before.<sup>2</sup> Some see beauty in the new jobs, increased

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\* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2012–2013.

<sup>1</sup> Laura Bly, *North Dakota Towns Fuel a Well-Oiled Tourism Boom: ‘Carbon Rush’ Pits Beauty and Business*, USA TODAY, Sept. 7, 2012, at 3D; Letter from Theodore Roosevelt to Anna Roosevelt (Aug. 17, 1884), in LETTERS FROM THEODORE ROOSEVELT TO ANNA ROOSEVELT COWLES 1870 TO 1918, at 62, 63 (1924).

<sup>2</sup> Monica Davey, *As Oil Flows in North Dakota, Job Boom and Burdens Follow*, N.Y. TIMES, Jan. 1, 2008, at A1; Clay Jenkinson, *It’s Not Just an Oil Boom, It’s an Industrial Revolution*, THE BISMARCK TRIBUNE, July 15, 2012, [http://bismarcktribune.com/news/columnists/clay-jenkinson/it-s-not-just-an-oil-boom-it-s-an/article\\_17f93572-cb75-11e1-a78b-001a4bcf887a.html](http://bismarcktribune.com/news/columnists/clay-jenkinson/it-s-not-just-an-oil-boom-it-s-an/article_17f93572-cb75-11e1-a78b-001a4bcf887a.html).

wealth, and new technologies.<sup>3</sup> For others, the situation has turned grim, with an increase in crime, traffic, air pollution, and cost of living.<sup>4</sup>

The culprit here is the Bakken formation, which has sat silently under North Dakota, Montana, and parts of Canada for millions of years and contains anywhere from ten billion to five-hundred billion barrels of oil.<sup>5</sup> The formation was discovered in the early 1950s, but it was not until 2007—with the introduction of horizontal drilling and fracking—that oil and gas companies could extract large amounts of natural resources.<sup>6</sup> More than four thousand new wells were drilled in the Bakken formation between 2007 and 2012, as compared to the three hundred wells drilled between 1953 and 2007.<sup>7</sup> This unprecedented increase in oil and gas exploration seems to have left nothing in the area unaffected, including the birds.<sup>8</sup>

Birds are attracted to bodies of water, but are also attracted to oil reserve pits because they resemble bodies of water.<sup>9</sup> As defined in North Dakota state law, a reserve pit is “an excavated area used to contain drill cuttings . . . and mud-laden oil and gas drilling fluids . . . or water.”<sup>10</sup> When a bird attempts to drink from a reserve pit, it can get caught in the oils and die from fatigue; alternatively, if the bird does not die in the pit it might die later or suffer long-term health problems.<sup>11</sup> This phenomenon is problematic for oil and gas companies because under the Migratory Bird Treaty Act (MBTA), Congress has made it a federal misdemeanor to “at any time, by any means or in any

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<sup>3</sup> Jenkinson, *supra* note 2; A. G. Sulzberger, *Amid a Housing Shortage, a North Dakota Oil Boom Creates Camps of Men*, N.Y. TIMES, Nov. 26, 2011, at A12.

<sup>4</sup> Davey, *supra* note 2, at A1, A14; Kevin G. Hall, *Boom & Busts: U.S. Oil Boom Comes with Tradeoffs and an Ugly Underbelly*, CHATTANOOGA TIMES FREE PRESS, Sept. 22, 2012, at C3.

<sup>5</sup> *Bakken Formation*, U. OF N.D. ENERGY AND ENVTL. RES. CENTER, <http://www.undeerc.org/bakken/bakkenformation.aspx>; *Development History*, U. OF N.D. ENERGY AND ENVTL. RES. CENTER, <http://www.undeerc.org/bakken/developmenthistory.aspx>; *Oil Production*, U. OF N.D. ENERGY AND ENVTL. RES. CENTER, <http://www.undeerc.org/bakken/oilproduction.aspx> (showing Bakken formation discovered in 1953).

<sup>6</sup> Davey, *supra* note 2, at A14; Jenkinson, *supra* note 2.

<sup>7</sup> *Monthly Bakken Oil Production Statistics*, N.D. DEP'T OF MIN. RES., <https://www.dmr.nd.gov/oilgas/stats/historicalbakkenoilstats.pdf> (including data through July 2012).

<sup>8</sup> See *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1203 (D.N.D. 2012); Hall, *supra* note 3.

<sup>9</sup> PEDRO RAMIREZ, JR., U.S. FISH & WILDLIFE SERV., RESERVE PIT MANAGEMENT: RISKS TO MIGRATORY BIRDS 9 (2009), available at <http://www.fws.gov/mountain-prairie/contaminants/documents/ReservePits.pdf>.

<sup>10</sup> N.D. CENT. CODE § 38-08-02 (2004).

<sup>11</sup> RAMIREZ, *supra* note 9.

manner . . . pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill . . . any migratory bird.”<sup>12</sup>

In 2011, three oil and gas companies drilling in the Bakken formation, Brigham Oil and Gas, L.P. (“Brigham”), Newfield Production Company (“Newfield”), and Continental Resources, Inc. (“Continental”), challenged their liability under the MBTA after multiple migratory birds were found dead in their reserve pits.<sup>13</sup> The companies called for a narrow reading of the MBTA and claimed that it only applied to activities *directed at* wildlife such as hunting or poaching.<sup>14</sup> The United States District Court for the District of North Dakota agreed with the companies and held that the MBTA misdemeanor provision applies only to those activities that are directed at wildlife—an extremely narrow and counter-precedential reading of the MBTA.<sup>15</sup>

This Comment argues that in *United States v. Brigham Oil & Gas, L.P.*, the court should not have granted the motion to dismiss. The MBTA misdemeanor provision is a criminal regulatory offense with no mental state requirement, which means it is up to the courts to decide who falls within its reach and who does not.<sup>16</sup> I argue first that the District of North Dakota failed in its reasoning by adhering to unrelated precedent, thereby confusing the state of the law and effectively rejecting the well-established strict liability standard for the MBTA misdemeanor provision.<sup>17</sup> Second, I argue that a violation of the MBTA misdemeanor provision is an “innocent conduct offense” rather than a “public welfare offense.”<sup>18</sup> In this framework, the conduct of Brigham, Newfield, and Continental is within the scope of the MBTA, and the court should have allowed the case to proceed.<sup>19</sup>

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<sup>12</sup> Migratory Bird Treaty Act, 16 U.S.C. § 703(a) (2006); *Brigham*, 840 F. Supp. 2d at 1203.

<sup>13</sup> *Brigham*, 840 F. Supp. 2d at 1203–1206.

<sup>14</sup> Defendants Brigham and Newfields’s Joint Memorandum of Law in Support of Motion to Dismiss the Informations at 8, *Brigham*, 840 F. Supp. 2d 1202 (Nos. 4:11-po-00005-DLH, 4:11-po-00009-DLH); Continental Resources, Inc.’s Memorandum in Support of Motion to Dismiss at 8, 9, *Brigham*, 840 F. Supp. 2d 1202 (No. 4:11-po-00004-DLH).

<sup>15</sup> *Brigham*, 840 F. Supp. 2d at 1211; see *infra* notes 85–100 and accompanying text.

<sup>16</sup> Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL. L. 1165, 1173, 1175 (1995); see, e.g., *Staples v. United States*, 511 U.S. 600, 604–05 (1994); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 535–36 (E.D. Cal.), *aff’d on other grounds*, 578 F.2d 259 (9th Cir. 1978).

<sup>17</sup> See *infra* notes 85–100 and accompanying text.

<sup>18</sup> See *infra* notes 101–105 and accompanying text.

<sup>19</sup> See *infra* notes 106–113 and accompanying text.

## I. FACTS AND PROCEDURAL HISTORY

This case revolves around three companies engaged in oil and gas exploration in the Bakken formation: Brigham Oil and Gas, L.P. (“Brigham”), Newfield Production Company (“Newfield”), and Continental Resources, Inc. (“Continental”).<sup>20</sup>

Brigham owns an oil reserve pit on its drilling site, “Lippert,” located in Williams County, North Dakota.<sup>21</sup> Drilling started on the Lippert site on June 20, 2010, and ended on November 14, 2010.<sup>22</sup> On May 6, 2011 an enforcement officer for the Fish and Wildlife Service (FWS) in North Dakota found two dead mallards covered in oil in the reserve pit on the Lippert site.<sup>23</sup> The pit was neither netted nor flagged at the time of inspection.<sup>24</sup>

Newfield owns an oil reserve pit on its drilling site, “Manolo,” located in Williams County, North Dakota.<sup>25</sup> Drilling started on the Manolo site on September 18, 2010, and ended on February 14, 2011.<sup>26</sup> On May 17, 2011, fluid from a reserve pit on the Manolo site overflowed into a nearby wetland, and on May 18, 2011, an inspector from the North Dakota Department of Health discovered two dead mallards at the wetland’s edge.<sup>27</sup> A biologist from the North Dakota Game and Fish Department discovered a third dead and oiled duck in the same area on the same day.<sup>28</sup> On the following day, May 19, an enforcement officer from the FWS discovered a fourth dead and oiled bird one hundred yards from the edge of the wetland.<sup>29</sup>

Continental owns a reserve pit on its drilling site, “Lokken,” located in Williams County, North Dakota.<sup>30</sup> Drilling began on the Lok-

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<sup>20</sup> 840 F. Supp. 2d at 1203. Initially, seven oil and gas companies were charged. Three companies entered into plea agreements with the government, and the government dismissed the charge against the fourth company. *Id.*

<sup>21</sup> *Id.* at 1204.

<sup>22</sup> *Id.* at 1205.

<sup>23</sup> Statement of Probable Cause at 1, 7, *Brigham*, 840 F. Supp. 2d 1202 (No. 4:11-po-00005-DLH) [hereinafter *Brigham Probable Cause*].

<sup>24</sup> *Id.* “Reserve pit[s] used solely for drilling, completing, recompleting, or plugging” may remain uncovered during the drilling process but must be reclaimed no more than six months after completion, and must be netted if the pit is not reclaimed within ninety days of completion. N.D. ADMIN. CODE 43–02–03–19, 43–02–03–19.1 (Apr. 2012).

<sup>25</sup> *Brigham*, 840 F. Supp. 2d at 1205.

<sup>26</sup> Statement of Probable Cause at 8, *Brigham*, 840 F. Supp. 2d 1202 (No. 4:11-po-00009-DLH) [hereinafter *Newfield Probable Cause*].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1, 8.

<sup>30</sup> *Brigham*, 840 F. Supp. 2d at 1206.

ken site on January 27, 2011 and ended on May 6, 2011.<sup>31</sup> On May 6, 2011 an inspector from the FWS found a dead and oiled say's phoebe at the reserve pit.<sup>32</sup> The pit was neither netted nor flagged during the time of inspection.<sup>33</sup>

For Brigham, Newfield, and Continental, this was not the first time that the FWS found dead migratory birds on company property.<sup>34</sup> Previously, the FWS had charged each company with violations of the MBTA.<sup>35</sup> Additionally, the FWS sent each company information and guidance regarding the threat of reserve pits to migratory birds, and how to prevent future bird deaths.<sup>36</sup> In light of the newest inspections and charges, the companies decided to challenge their liability under the MBTA and filed a motion to dismiss the charges, asserting that their lawful commercial activity—which incidentally caused bird deaths—was outside the scope of the MBTA.<sup>37</sup> The United States District Court for the District of North Dakota granted the motion to dismiss, finding that the lawful commercial activity of oil and gas exploration is outside the purview of the MBTA.<sup>38</sup> The court held the MBTA applies only to conduct *directed at* wildlife, such as hunting and poaching.<sup>39</sup>

The government appealed the unfavorable ruling to the United States Court of Appeals for the Eighth Circuit, but then voluntarily dismissed its cases against Brigham, Newfield, and Continental pursuant to Federal Rule of Appellate Procedure 42(b).<sup>40</sup>

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<sup>31</sup> Statement of Probable Cause at 8, *Brigham*, 840 F. Supp. 2d 1202 (No. 4:11-po-00004-DLH) [hereinafter Continental Probable Cause].

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Brigham Probable Cause, *supra* note 23, at 4; Continental Probable Cause, *supra* note 31, at 5; Newfield Probable Cause, *supra* note 26, at 5.

<sup>35</sup> Brigham Probable Cause, *supra* note 23, at 4; Continental Probable Cause, *supra* note 31, at 5; Newfield Probable Cause, *supra* note 26, at 5.

<sup>36</sup> Brigham Probable Cause, *supra* note 23, at 4–5; Continental Probable Cause, *supra* note 31, at 5–6; Newfield Probable Cause, *supra* note 26, at 5–6.

<sup>37</sup> Defendants Brigham and Newfields's Joint Memorandum of Law in Support of Motion to Dismiss the Informations, *supra* note 14; Continental Resources, Inc.'s Memorandum in Support of Motion to Dismiss, *supra* note 14, at 9.

<sup>38</sup> *Brigham*, 840 F. Supp. 2d at 1203, 1211.

<sup>39</sup> *Id.* at 1213.

<sup>40</sup> FED. R. APP. P. 42(b) ("An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court."); Motion of the United States for Voluntary Dismissal of Appeals Pursuant to Fed. R. App. P. 42(b) at 2, *United States v. Continental Res., Inc.*, Nos. 12–1375, 12–1376, 12–1377 (8th Cir. dismissed Apr. 18, 2012) (Nos. 12–1375, 12–1376, 12–1377).

## II. LEGAL BACKGROUND

The MBTA is a criminal statute that makes it “unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill [or] attempt to take, capture, or kill [or] possess . . . any migratory bird.”<sup>41</sup> Congress enacted the MBTA in 1918 after signing a treaty with Great Britain to protect migratory birds.<sup>42</sup> Both countries agreed that migratory birds were important “as a source of food [and for] destroying insects which are injurious to forests and forage plants . . . as well as to agricultural crops.”<sup>43</sup>

As enacted, the MBTA contained no mental state requirement, and left any person, corporation, association, or partnership who in any way violated the Act vulnerable to punishment.<sup>44</sup> As the case law surrounding the MBTA developed, most federal courts interpreted violation of the Act as a strict liability offense.<sup>45</sup> The first district to interpret the MBTA as a strict liability offense was the Western District of Tennessee in the 1939 case *United States v. Reese*.<sup>46</sup> The *Reese* court found “[t]he deduction is plain that Congress deliberately omitted scienter as an essential ingredient of the minor offense under consideration. . . . Congress clearly intended to make real the protection against the holocaustic slaughter of migratory birds.”<sup>47</sup> After 1939 almost all circuit courts followed suit and applied this reasoning to other provisions in the MBTA and over time established that a violation of the misdemeanor provision MBTA is a strict liability offense.<sup>48</sup> Congress affirmed the strict liability standard in a Senate report accompanying a 1986 amendment adding a “knowingly” requirement to the felony provision by stating: “[n]othing

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<sup>41</sup> 16 U.S.C. § 703(a) (2006). Currently, the MBTA protects more than one thousand species of birds. 50 C.F.R. § 10.13 (2011); News Release, U.S. Fish & Wildlife Serv., Official Number of Protected Migratory Bird Species Climbs to More than 1,000 (Mar. 1, 2010), available at <http://www.fws.gov/news/NewsReleases/showNews.cfm?newsId=1A6C3012-D22E-4F75-ABD98CD33992DD42>.

<sup>42</sup> Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–712 (2006)); Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702, 1702.

<sup>43</sup> Convention Between the United States and Great Britain for the Protection of Migratory Birds, *supra* note 42.

<sup>44</sup> See Migratory Bird Treaty Act, § 6, 40 Stat. at 756.

<sup>45</sup> See, e.g., *Rogers v. United States*, 367 F.2d 998, 1001 (8th Cir. 1966); *United States v. Reese*, 27 F. Supp. 833, 835 (W.D. Tenn. 1939); S. Rep. No. 99–445, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128. *But see* *United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985).

<sup>46</sup> *Reese*, 27 F. Supp. at 835; Larry Martin Corcoran, *Migratory Bird Treaty Act: Strict Criminal Liability for Non-Hunting, Human Caused Bird Deaths*, 77 DENV. U. L. REV. 315, 318 (1999).

<sup>47</sup> *Reese*, 27 F. Supp. at 835.

<sup>48</sup> Corcoran, *supra* note 46, at 318 & n.17.

in this amendment is intended to alter the ‘strict liability’ standard for misdemeanor prosecutions under 16 U.S.C. 707(a), a standard which has been upheld in many Federal court decisions.”<sup>49</sup>

Congress regularly uses statutes to regulate certain types of conduct deemed undesirable for public policy reasons.<sup>50</sup> Similar to the MBTA, many of these criminal regulatory statutes have no mental state requirement, and the courts must interpret an appropriate requirement, as absolute liability is not always suitable.<sup>51</sup> A court may choose what sort of mental state to infer based on whether the court categorizes the violation as a “public welfare offense” or an “innocent conduct offense.”<sup>52</sup>

Recently, the Supreme Court discussed the distinction between public welfare offenses and innocent conduct offenses in *Staples v. United States*.<sup>53</sup> The Court categorized public welfare offenses as violations of statutes that regulate dangerous and uncommon activities such as the possession of narcotics, the transportation of hazardous material, or labeling pharmaceuticals.<sup>54</sup> The required mental state for a public welfare offense is low, the defendant must merely be aware that the conduct is of such a nature that it might be regulated.<sup>55</sup> Innocent conduct offenses on the other hand, usually involve violation of statutes regulating commonplace activities that less endanger the public such as the illegal sale of food stamps.<sup>56</sup> The required mental state for innocent conduct offenses is higher and requires that the defendant be aware of the specific facts that bring the conduct within the scope of the stat-

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<sup>49</sup> S. Rep. No. 99-445, at 16; *see, e.g.*, *United States v. Catlett*, 747 F.2d 1102, 1105 (6th Cir. 1984).

<sup>50</sup> *See, e.g.*, *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943) (mislabelled pharmaceuticals); *United States v. Balint*, 258 U.S. 250, 251, 252 (1922) (unlawful possession of narcotics).

<sup>51</sup> *Staples v. United States*, 511 U.S. 600, 610 (1994) (discussing *Liparota v. United States*, 471 U.S. 419, 426, 433 (1985)); *see* 16 U.S.C. § 707(a) (2006).

<sup>52</sup> Mandiberg, *supra* note 16, at 1203-04; *see Staples*, 511 U.S. at 608-13. The term public welfare offense is well-established term used in case law when applicable. *See* Mandiberg, *supra* note 16, at 1198. The term innocent conduct offense is a created term borrowed and modified from a law review article meant to denote “everything else” that is not a public welfare offense, but still falls into the category of criminal regulatory offenses. *See id.* at 1199.

<sup>53</sup> *See* 511 U.S. at 608-16.

<sup>54</sup> *Id.* at 607 (citing *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1971); *Dotterweich*, 320 U.S. at 281; *Balint*, 258 U.S. at 254). Public welfare offenses are also characterized by not having any history in the common law and by small penalties, which do not harm the reputation of the wrongdoer. *Morissette v. United States*, 342 U.S. 246, 255-56 (1952).

<sup>55</sup> *Staples*, 511 U.S. at 629 (Stevens, J., dissenting) (citing *Liparota*, 471 U.S. at 433, 443, n.7).

<sup>56</sup> Mandiberg, *supra* note 16, at 1203-04; *see id.* at 610.



ute.<sup>57</sup> The statute at issue in the *Staples* case prohibits the possession of an unregistered automatic weapon.<sup>58</sup> The Court concluded that violation of this statute was an innocent conduct offence because although gun ownership may be dangerous, it is a common phenomenon in America, and therefore the prosecution must prove a higher mental state in order to convict.<sup>59</sup>

The MBTA as a criminal regulatory statute has been applied to the conduct of commercial actors with varying results—some courts have essentially exempted commercial actors while others analyze their violations as innocent conduct or public welfare offenses.<sup>60</sup> Recently, in *Newton County Wildlife Ass'n v. U.S. Forest Service*, a wildlife conservation group sued the U.S. Forest Service (USFS).<sup>61</sup> The conservation group claimed that the USFS violated the Administrative Procedure Act (APA) by approving timber harvesting under the National Forest Management Act (NFMA) while the agency was aware that timber harvesting would modify the habitats of migratory birds and possibly result in bird deaths.<sup>62</sup> On appeal, the conservation group argued that the USFS acted arbitrarily and capriciously under the NFMA “because the agency ignored or violated its obligations under MBTA.”<sup>63</sup> The Eighth Circuit found this argument unpersuasive and suggested that the MBTA should apply only to actions directed at migratory birds such as hunting and poaching.<sup>64</sup> The court qualified this statement by acknowledging its assertions regarding the scope of the MBTA were “necessarily tentative” because the Fish & Wildlife Service (FWS) was not involved in the

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<sup>57</sup> *Staples*, 511 U.S. at 619. In the MBTA context, courts have expressed this heightened mental state requirement through proximate causation, requiring that the harm be reasonably foreseeable. See, e.g., *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 690 (10th Cir. 2010); *United States v. Moon Lake Electric Ass'n*, 45 F. Supp. 2d 1070, 1085 (D. Colo. 1999). Both proximate causation and the *Staples* “specific facts” language boil down to the same main idea—the court requires “something more” than mere awareness that the defendant is engaged in an activity that may be regulated. Mandiberg, *supra* note 16, at 1199; see, e.g., *Apollo Energies*, 611 F.3d at 690; *Moon Lake*, 45 F. Supp. 2d at 1085.

<sup>58</sup> *Staples*, 511 U.S. at 605, 616 (citing 26 U.S.C. § 5861(d)).

<sup>59</sup> See *Staples*, 511 U.S. at 610, 611, 619. Specifically, the prosecution had to prove that defendant knew his weapon was automatic, and not merely that defendant knew his conduct could be subject to regulation. *Id.* at 619.

<sup>60</sup> See, e.g., *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1211 (D.N.D. 2012); *Apollo Energies*, 611 F.3d at 690; *United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978).

<sup>61</sup> *Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997).

<sup>62</sup> *Id.* at 114, 115.

<sup>63</sup> *Id.* at 114.

<sup>64</sup> See *id.* at 115.

suit, and the FWS is the agency in charge of administering and enforcing the MBTA.<sup>65</sup>

Other federal circuits and districts have dealt with commercial actor liability under the MBTA more directly.<sup>66</sup> An early case addressing the issue was *United States v. Corbin Farm Service*, which the United States District Court for the Eastern District of California decided in 1978.<sup>67</sup> In *Corbin*, a producer and distributor of pesticides was charged with a violation of the MBTA after multiple migratory birds were found dead and poisoned on a field that had been improperly sprayed with pesticides.<sup>68</sup> The court rejected the defendant's argument that prosecution under the MBTA is limited to hunting and poaching by noting "[t]he fact that Congress was primarily concerned with hunting does not . . . indicate that hunting was its sole concern."<sup>69</sup> The court determined that this violation of the MBTA was a public welfare offense because the defendant was dealing with dangerous pesticides, which should alert a person to regulation.<sup>70</sup>

In 2009, the Western District of Louisiana rejected the argument that lawfully operating oil companies are liable under the MBTA misdemeanor provision in *United States v. Chevron USA, Inc.*<sup>71</sup> In that case, Chevron outfitted its wellhead with a steel structure called a "caisson."<sup>72</sup> Later, Chevron found thirty-five dead birds in the space between the wellhead and the caisson and was charged with violating the MBTA.<sup>73</sup> The court did not analyze violation of the MBTA misdemeanor provision as a public welfare offense, and instead found Chevron's conduct to be completely outside the scope of the Act.<sup>74</sup> The court reasoned that the MBTA misdemeanor provision was "clearly not intended to apply to commercial ventures where, occasionally, protected species might be incidentally killed as a result of totally legal and permissible activities."<sup>75</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> See *infra* notes 67–84 and accompanying text.

<sup>67</sup> 444 F. Supp. 510 (E.D. Cal.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978).

<sup>68</sup> *Corbin*, 444 F. Supp. at 514–15.

<sup>69</sup> *Id.* at 531–32.

<sup>70</sup> See *id.* at 535–36.

<sup>71</sup> No. 09-CR-0132, 2009 WL 3645170, at \*3 (W.D. La. Oct. 30, 2009).

<sup>72</sup> *Id.* at \*1. Caissons are used to protect wellheads from damage, and once installed, resembles a large steel pipe surrounding the outside of the wellhead. *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See *id.* at \*3, \*4.

<sup>75</sup> *Id.* at \*3.

In 2010, the Tenth Circuit heard a similar case involving oil and gas companies, *United States v. Apollo Energies, Inc.*<sup>76</sup> In this case, two Kansas oil operators, Apollo and Walker, were charged with violations of the misdemeanor provision of the MBTA after dead birds were found lodged in both operators' heater-treaters.<sup>77</sup> The defendants claimed the MBTA was "unconstitutional as applied to their conduct."<sup>78</sup> The court cited *Staples* in affirming "the basic proposition that public welfare or regulatory offenses can impose a form of strict criminal liability," and found the MBTA misdemeanor violation requires a higher mental state than what is required for a public welfare offense.<sup>79</sup> The court used the concept of foreseeability to frame its analysis.<sup>80</sup> The court found Apollo liable under the MBTA in part because on a prior occasion FWS found dead birds in Apollo's heater-treaters.<sup>81</sup> Instead of prosecuting this violation, FWS initiated a regional awareness campaign about heater-treaters and migratory bird mortality—but when the campaign finished, FWS found more dead birds in Apollo's heater-treaters and initiated prosecution.<sup>82</sup> The court reasoned that conviction was fair in this case because Apollo knew its heater-treaters had killed birds in the past, and as part of the education campaign, was aware of the threat that heater-treaters posed to migratory birds.<sup>83</sup> The court, however, dismissed some charges against Walker because it was not part of the awareness campaign and had no prior experience with birds dying in its heater-treaters.<sup>84</sup>

### III. ANALYSIS

The U.S. District Court for the District of North Dakota in *United States v. Brigham Oil & Gas, L.P.*, held that the MBTA misdemeanor provision applies only to physical conduct of the sort engaged in by hunt-

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<sup>76</sup> 611 F.3d 679, 681–82 (10th Cir. 2010).

<sup>77</sup> *Id.* at 682. Heater-treaters are common devices used in oil drilling. *Id.* A heater-treater is a piece of cylindrical equipment that can extend up to twenty feet tall and more than three feet wide, and its function is to separate the oil from the water after the oil-water mixture is pumped from the ground. *Id.* The heater-treaters in this case have exhaust pipes into which birds can crawl. *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 686 (citing *Staples v. United States*, 511 U.S. 600, 606 (1994)) (internal quotations omitted), *see id.* at 690.

<sup>80</sup> *Id.* at 690.

<sup>81</sup> *Id.* at 682, 691.

<sup>82</sup> *Apollo Energies*, 611 F.3d at 682–83.

<sup>83</sup> *Id.* at 682–83, 691.

<sup>84</sup> *Id.* at 691. Walker was charged with violations in 2007 and 2008; the court dismissed the 2007 charge for lack of foreseeability and notice, but upheld the 2008 charge. *Id.*

ers and poachers.<sup>85</sup> The court relied on dicta from *Newton County Wildlife Association v. U.S. Forest Service*, which resulted in the court forging a nonsensical distinction between indirect and direct conduct.<sup>86</sup> Instead of applying the dicta from a civil suit, and fully exempting commercial actors not engaged in conduct directed at birds from MBTA liability, the court should have assessed the situation in light of the MBTA's role as a criminal regulatory statute.<sup>87</sup>

In coming to its overly narrow interpretation of the scope of the MBTA misdemeanor provision, the *Brigham* court inappropriately bound itself to dicta in *Newton County*, but *Newton County* and *Brigham* are not two birds of a feather.<sup>88</sup> First, *Newton County* was a civil case brought by a wildlife conservation organization under the Administrative Procedure Act with no involvement by the Fish & Wildlife Service (FWS).<sup>89</sup> The case was premised on possible future bird deaths from a timber harvesting operation.<sup>90</sup> The MBTA, however, is a criminal statute punishing actual harms.<sup>91</sup> Without the involvement of the FWS and prosecutors, any conclusions as to the scope of the MBTA are “necessar-

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<sup>85</sup> 840 F. Supp. 2d 1202, 1211 (D.N.D. 2012) (“This Court expressly finds that the use of reserve pits in commercial oil development is legal, commercially-useful activity that stands outside the reach of the federal Migratory Bird Treaty Act. Like timber harvesting, oil development and production activities are not the sort of physical conduct engaged in by hunters and poachers, and such activities do not fall under the prohibitions of the Migratory Bird Treaty Act.”).

<sup>86</sup> See *id.* at 1211 (citing *Newton Cnty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997)); see *United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d 1070, 1077 (D. Colo. 1999) (noting that when interpreting the MBTA a “distinction between an ‘indirect’ and ‘direct’ ‘taking’ is illogical”).

<sup>87</sup> Cf. *United States v. CITGO Petroleum Corp.*, No. C-06-563, 2012 WL 3866857, at \*6-8 (S.D. Tex. Sept. 5, 2012) (refraining from exempting commercial actors from MBTA liability and analyzing the MBTA as a criminal regulatory statute to find defendants liable because defendant’s uncovered oil tanks were unlawful, and bird deaths as a result of exposure to oil tanks was foreseeable). But cf. *United States v. Chevron USA, Inc.*, No. 09-CR-0132, 2009 WL 3645170, at \*3 (W.D. La. Oct. 30, 2009) (finding that companies engaged in lawful commercial activities that incidentally result in bird deaths are not liable under the MBTA). The U.S. District Court for the District of North Dakota is not the only jurisdiction in which a court has made a blanket statement about a certain group’s liability under the MBTA rather than analyzing the facts of the case through the criminal regulatory framework. See *id.* This Comment, however, argues that a violation of the MBTA should be analyzed in the criminal regulatory framework because this is consistent with precedent and congressional intent. See *infra* notes 101-105, and accompanying text.

<sup>88</sup> See *Newton Cnty.*, 113 F.3d at 115; *Brigham Oil*, 840 F. Supp. 2d at 1211.

<sup>89</sup> *Newton Cnty.*, 113 F.3d at 114, 115. Congress delegated exclusive power to the Secretary of Interior to administer and enforce the MBTA. 16 U.S.C. §§ 706, 709a (2006). The FWS is in charge of enforcing the MBTA. *Newton Cnty.*, 113 F.3d at 115.

<sup>90</sup> *Newton Cnty.*, 113 F.3d at 115.

<sup>91</sup> 16 U.S.C. §§ 703(a), 707.

ily tentative” because it is unclear whether the United States would have even pursued the case in the first place.<sup>92</sup> Unlike *Newton County*, in *Brigham* the United States voiced its opinion on the scope of the MBTA and chose to prosecute defendant companies after multiple migratory birds were found dead in and around their reserve pits.<sup>93</sup>

After a detailed discussion of *Newton County*, the *Brigham* court forged a distinction between indirect and direct conduct as a way to limit the scope of the MBTA.<sup>94</sup> This distinction adds an intent requirement to the misdemeanor provision of the MBTA, requiring the prosecution to prove that a defendant directed its conduct towards wildlife.<sup>95</sup> It also conflicts with the existing Eighth Circuit decisions that declined to read a scienter element into the MBTA.<sup>96</sup>

The *Brigham* court’s distinction between indirect and direct conduct led to its conclusion that the MBTA is limited to hunting and poaching, but legislative history demonstrates that Congress did not intend to limit the MBTA in this way.<sup>97</sup> In 1918, Congress was aware of other threats to migratory birds, such as agriculture and draining of swamps.<sup>98</sup> Today, migratory birds are also threatened by sources such as pesticides, skyscrapers, wind turbines, and oil reserve pits, which were not even conceivable when Congress enacted the MBTA.<sup>99</sup> Until Congress repeals or substantially narrows the MBTA to encompass only

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<sup>92</sup> See *id.* § 706 (delegating authority to Department of Interior to make arrests); *Newton Cnty.*, 113 F.3d at 115 (noting its conclusions regarding the MBTA are “necessarily tentative” because the FWS expressed no views on the proceeding).

<sup>93</sup> Compare *Brigham Probable Cause*, *supra* note 23, at 1 (FWS involvement), with *Newton Cnty.*, 113 F.3d at 115 (no FWS involvement).

<sup>94</sup> *Brigham*, 840 F. Supp. 2d at 1212.

<sup>95</sup> See *id.*; *Moon Lake*, 45 F. Supp. 2d at 1077.

<sup>96</sup> See *United States v. Manning*, 787 F.2d 431, 435 n.4 (8th Cir. 1986); *Rogers v. United States*, 367 F.2d 998, 1001 (8th Cir. 1966).

<sup>97</sup> *Brigham*, 840 F. Supp. 2d at 1211, 1212; e.g., *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal.), *aff’d on other grounds*, 578 F.2d 259 (9th Cir. 1978) (reasoning for pesticides dealer that “[t]he legislative history of the Act reveals no intention to limit the Act so that it would not apply to poisoning”); *Moon Lake*, 45 F. Supp. 2d at 1082 (“[T]here is no clearly expressed legislative intent that the MBTA regulates only physical conduct associated with hunting or poaching.”).

<sup>98</sup> See H.R. REP. NO. 65-243, at 2 (1918) (letter from Secretary of State Robert Lansing to the President) (“Not very many years ago vast numbers of . . . birds nested within the limits of the United States . . . but the extension of agriculture, and particularly the draining on a large scale of swamps and meadows, together with improved firearms and a vast increase in the number of sportsmen, have so altered conditions that comparatively few migratory game birds nest within our limits.”) (quoting the Department of Agriculture).

<sup>99</sup> See *Brigham*, 840 F. Supp. 2d at 1203; *Migratory Bird Mortality: Many Human-Caused Threats Afflict our Bird Populations*, U.S. FISH & WILDLIFE SERV., 1-2 (2002), [www.fws.gov/birds/mortality-fact-sheet.pdf](http://www.fws.gov/birds/mortality-fact-sheet.pdf).

those threats to birds that existed in 1918, the MBTA should evolve congruently with changing times and apply to new threats as they appear.<sup>100</sup>

Instead of relying on *Newton County*'s non-binding precedent and in essence writing a scienter requirement into the MBTA misdemeanor provision, the *Brigham* court should have analyzed the situation as a violation of a criminal regulatory statute. Within this framework, the MBTA misdemeanor provision is better categorized as an innocent conduct offense rather than a public welfare offense.<sup>101</sup> On its face, the MBTA is meant to regulate the amount of bird deaths through an outright prohibition on the killing, taking, and possession of migratory birds.<sup>102</sup> The act of killing, taking, or possessing a bird is not dangerous to humans or property in the same way that mislabeled pharmaceuticals, grenades, and hazardous wastes are.<sup>103</sup> Viewing violation of the MBTA misdemeanor provision as an innocent conduct offense comports with the strict liability standard while at the same time avoiding the constitutional problems that may occur through categorizing violation as a public welfare offense.<sup>104</sup> Prosecuting a violation of the misdemeanor provision as a public welfare offense may result in a criminalization of a wide range of innocent conduct considering the exorbitant number of birds that are killed as a result of completely lawful activities and accidents.<sup>105</sup>

Viewing the offenses of the defendants in *Brigham* as innocent conduct offenses, the standard set forth in *Staples* requires that the

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<sup>100</sup> William n.Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1539–41, 1540 n.247 (1987) (offering multiple examples of the Supreme Court incorporating present day conditions into the interpretation of old statutes).

<sup>101</sup> See Mandiberg, *supra* note 16, at 1215. Advocates who argue that violation of the MBTA is a public welfare offense usually have a different base of analysis. *Id.* at 1216, 1218; see, e.g., *United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978); *Corbin*, 444 F. Supp. at 536. For example, in *Corbin*, the court did not base the finding of a public welfare offense on the plain language of the statute; rather it examined the specific way in which the birds were killed. See 444 F. Supp. at 535–36. The court reasoned the violation was a public welfare offense because the offender was using toxic pesticides that should have alerted the offender to regulation, not because the killing of birds itself is dangerous. See *id.* This is a possible path of analysis, but the Supreme Court has consistently based determination of public welfare offenses on the nature of the regulated activity in the statute, and not the specific facts surrounding each case. *Staples v. United States*, 511 U.S. 600, 607 (1994); Mandiberg, *supra* note 16, at 1218.

<sup>102</sup> 16 U.S.C. § 703(a).

<sup>103</sup> See *Staples*, 511 U.S. at 607, 610; Mandiberg, *supra* note 16, at 1198–99, 1215.

<sup>104</sup> See *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 690 (10th Cir. 2010) (“When the MBTA is stretched to criminalize predicate acts that could not have been reasonably foreseen to result in a proscribed effect on birds, the statute reaches its constitutional breaking point.”).

<sup>105</sup> See 16 U.S.C. § 703(a); Migratory Bird Mortality, *supra* note 99.

prosecution prove that the defendants were aware of the specific facts that brought their conduct within the scope of the act.<sup>106</sup> This means that the prosecution would have to prove that each company was aware that its reserve pits could kill birds.<sup>107</sup>

The facts in *Brigham* are very similar to the facts surrounding one of the companies in *United States v. Apollo Energies, Inc.*<sup>108</sup> Apollo, unlike its co-defendant Walker, foresaw the threat that its heater-treaters posed to migratory birds.<sup>109</sup> FWS had previously found dead birds in Apollo's heater-treaters and included Apollo in an awareness campaign regarding the threats that heater-treaters posed to migratory birds.<sup>110</sup> Accordingly, the Tenth Circuit found that Apollo Energies was aware of the specific facts that brought it under the scope of the MBTA and upheld the conviction.<sup>111</sup> The defendants in *Brigham* found themselves in an almost identical situation to Apollo: they each had previous violations under the MBTA and FWS sent detailed letters regarding the threats that oil reserve pits posed to migratory birds.<sup>112</sup>

Brigham, Newfield, and Continental were each aware of the existence of the MBTA and of the specific facts that brought their conduct within its scope, thereby satisfying the mental state requirement for innocent conduct offenses.<sup>113</sup> For this reason, the District of North Dakota should have allowed the case to proceed and not dismissed it.

#### CONCLUSION

The MBTA misdemeanor provision is a criminal statute with broad applicability and small penalties enacted for the purpose of protecting migratory birds. As such, it is part of a well-established collection of

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<sup>106</sup> See *Staples*, 511 U.S. at 619.

<sup>107</sup> See *id.* Different courts have described this requirement in different ways. See *Apollo Energies*, 611 F.3d at 690; *Moon Lake*, 45 F. Supp. 2d at 1085. Whether addressed through *Staples* analysis or proximate causation, the same question must be answered—whether Brigham, Newfield, and Continental knew enough about their conduct as to bring it within the scope of the MBTA. See *supra* note 57.

<sup>108</sup> See 611 F.3d at 682–83, 691; Brigham Probable Cause, *supra* note 23, at 4–5; Continental Probable Cause, *supra* note 31, at 5–6; Newfield Probable Cause, *supra* note 26, at 5–6.

<sup>109</sup> See *Apollo Energies*, 611 F.3d at 691.

<sup>110</sup> *Id.* at 682–83.

<sup>111</sup> *Id.* at 691.

<sup>112</sup> See Brigham Probable Cause, *supra* note 23, at 4–5; Continental Probable Cause, *supra* note 31, at 5–6; Newfield Probable Cause, *supra* note 26, at 5–6.

<sup>113</sup> Brigham Probable Cause, *supra* note 23, at 4–5; Continental Probable Cause, *supra* note 31, at 5–6; Newfield Probable Cause, *supra* note 26, at 5–6; see *Staples*, 511 U.S. at 619; Mandiberg, *supra* note 16, at 1203–04.

criminal regulatory statutes used by Congress as a means of regulating certain conduct. The legislative history surrounding the enactment of the MBTA indicates no intent on the part of Congress to limit the statute to hunting and poaching violations. Nevertheless, this is exactly what the District of North Dakota held in *United States v. Brigham Oil & Gas, L.P.* The court's holding was a result of reliance on non-binding precedent and a narrow reading of the MBTA instead of an analysis of the violation as a criminal regulatory offense.

The MBTA does not regulate the type of dangerous conduct that warrants the lowest level of mental states, however, it still does not require the prosecution to prove the existence of scienter. Instead, courts should interpret the MBTA to require that the offender be aware of the specific facts of his or her conduct that cause bird deaths. In this case, Brigham, Newfield, and Continental were all aware that their oil reserve pits could cause bird deaths, and thus the case against them should not have been dismissed.



